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Supreme Court of the United

October Term, 1970

No. 984

UNITED CONCRETE PIPE CORPORATION, SUPER-SCOTT, INC., KAISER STEEL CORPORATION, UNITED STATES STEEL CORPORATION, U. S. SUPERPIPE, INC., all corporations,

Petitioners,

vs.

MARICOPA COUNTY, a body politic, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

Supreme Court of the United States

October Term, 1970
No. .....

UNITED CONCRETE PIPE CORPORATION, SMITH-SCOTT, INC., KAISER STEEL CORPORATION, UNITED STATES STEEL CORPORATION, U. S. INDUSTRIES, INC., all corporations,

Petitioners,

vs.

MARICOPA COUNTY, a body politic, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners United Concrete Pipe Corporation, Smith-Scott, Inc., Kaiser Steel Corporation, United States Steel Corporation and U. S. Industries, Inc., defendants below, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on August 28, 1970 (Appendix "A" hereto), affirming the order of the United States District Court for the District of Arizona denying the motion of petitioners to dismiss the action.

Opinions Below.

The Opinion of the District Court is reported at 303 F. Supp. 77 (D. Ariz. 1969), (Appendix "B" hereto).

The Opinion of the Court of Appeals for the Ninth Circuit has not yet been officially reported (Appendix "C" hereto).

Jurisdiction.

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1). The judgment of the United States Court of Appeals for the Ninth Circuit in this case was filed and entered August 28, 1970. Petitions for rehearing were filed on September 10, 1970, and the order of such Court denying the petitions for rehearing was filed on October 26, 1970 (Appendix "D" hereto). This petition for *certiorari* is being filed within 90 days of the aforesaid dates.

Questions Presented.

1. Whether a plaintiff in a private antitrust action may use successive, non-contemporaneous Government actions to extend indefinitely the suspension of the statute of limitations beyond the four-year period of Section 4B of the Clayton Act and beyond the one-year period of Section 5(b) of the Clayton Act.

2. Whether the period of suspension of the statute of limitations pursuant to Section 5(b) ends as to each defendant one year after the termination of the Government action against each such defendant.

3. Whether the suspension provisions of Section 5(b) of the Clayton Act apply to a defendant in a treble damage action who was neither a party to nor a named co-conspirator in the previous suspending Government action.

4. Whether Section 5(b) of the Clayton Act will toll the statute of limitations as to an action for damages by a governmental entity.

Statutes, Federal Rules and Regulations Involved.

1. United States Code, Title 15, Section 15 (Clayton Act of Oct. 15, 1914, c. 323, § 4, 38 Stat. 731);
2. United States Code, Title 15, Section 15(a) (Clayton Act of Oct. 15, 1914, c. 323, § 4A, as added July 7, 1955, c. 283, § 1, 69 Stat. 282);
3. United States Code, Title 15, Section 15(b) (Clayton Act of Oct. 15, 1914, c. 323, § 4B, as added July 7, 1955, c. 283, § 1, 69 Stat. 283);
4. United States Code, Title 15, Section 16(b) (Clayton Act of Oct. 15, 1914, c. 323, § 5(b), 38 Stat. 731, as amended July 7, 1955, c. 283, § 2(b), 69 Stat. 283).

(See Appendix "E" hereto).

Statement of the Case.

Respondent, an Arizona County, filed a Complaint in the United States District Court for the District of Arizona on April 15, 1969, invoking the Court's jurisdiction under 15 U.S.C. § 15. The Complaint alleged a Sherman Act conspiracy which continued to "sometime in the year 1962." Accordingly, respondent's claim is barred by Section 4B of the Clayton Act[1] *unless* it is saved by the tolling provision of Section 5(b).[2] Petitioners assert it is not saved but is barred by Section 5(b) and Section 4B.

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[1] 15 U.S.C. § 15(b).

[2] 15 U.S.C. § 16(b).

Petitioners moved in the trial court to dismiss plaintiff's claim on the basis of Sections 4B and 5(b). The court denied the motions and certified its order to the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 1292(b). On August 28, 1970, such court entered its order affirming the foregoing order of the District Court and on October 26, 1970, filed its denial of a petition for rehearing. The motions below relied upon the following facts: plaintiff's cause of action is based upon five Government criminal actions initiated in March 1964 and terminated on June 19, 1964. These criminal actions constituted a "proceeding" capable under Section 5(b) of suspending the Section 4B limitation period "during the pendency of the Government proceeding and for one year thereafter," *i.e.*, until June 19, 1965. On June 23, 1964, four days after termination of the criminal actions, the Government filed five civil actions pursuant to Section 4A of the Clayton Act and the False Claims Act. These actions were not within Section 5(b) and could not invoke the tolling provision thereof. However, on October 28, 1964, the Government amended its complaints, adding claims for injunctive relief to restrain purported violations of the antitrust laws.

The Government civil actions were then consolidated with more than 100 separate actions involving more than 350 claimants, private and governmental, and pretrial proceedings were commenced under procedures instituted by the United States Court of Appeals for the Ninth Circuit to administer such complex, protracted multi-district litigation.[2] Such litigation, known as the

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[2]The foregoing events occurred prior to the enactment of Section 1407, Title 28, United States Code.

"Western Pipe Cases," was widely publicized and potential plaintiffs were exhorted to join in the proceedings.[4] Had the actions been tried, the proceedings would have demanded the efforts of substantially all of the available trial courts in the Ninth Circuit. Therefore, consolidated proceedings were designed for the purpose of effecting an orderly and expeditious administration of *all* claims in order to encourage *settlement*.

Encouragement became reality and defendants were forced into settlement. The smaller defendants realized that they could neither bear the cost of continued litigation nor pay a pro rata share of any acceptable settlement. In order to terminate the entire matter, the larger defendants, United States Steel Corporation, Kaiser Steel Corporation and Martin-Marietta Corporation, were forced to contribute more than $4,000,000 *in excess* of their pro rata share of the initial settlement of $21,275,000. This settlement, effective May 5, 1967, would not have been made but for the reliance by all defendants upon the statute of limitations and their firm belief that *all* claimants had come forward.[5]

On December 8, 1967, all of the defendants, except American Pipe and Construction Co., entered into consent decrees in each of the Government civil injunctive cases in which they were named as defendants. American entered into consent decrees on May 27, 1968, in those actions in which it had been named as a defendant. The courts below held that the statute of limitations was tolled as to all defendants in all actions until one year after the date that American entered into its consent decrees in the Government equity actions.

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[4]See Affidavit of Jesse R. O'Malley, R. 378, *et seq.*, Vol. Two.

[5]See Affidavit of John S. Tennant, R. 64-66, Vol. One.

If the suspending provision of Section 5(b) was invoked by initiation of the Government criminal actions in March 1964 and the one-year suspension *and limitation* period of that Section began when those criminal actions terminated in June 1964, then both the four-year statute of Section 4B and the one-year statute of Section 5(b) have run on plaintiff's causes of action. Even if the subsequently filed Government civil actions invoked the suspension provision of Section 5(b) a second time, *that* second suspension has run out as to all defendants except American.

The conclusions of the lower courts that the subsequent Government actions invoked the Section 5(b) suspension of the statute of limitations and that the limitations period remained suspended until the last defendant settled (in the Government equity actions) are the errors on which this Petition is based.

REASONS FOR GRANTING THE WRIT.

I.

This Action Presents Important Questions of Construction of Section 5(b) of the Clayton Act Which Have Not Been but Should Be Settled by This Court.

A. The Decision Below Allowing a Plaintiff in an Antitrust Treble Damage Action to Utilize Successive, Non-Contemporaneous Government Actions to Abrogate the Barring Provisions of Section 5(b) of the Clayton Act Prejudices the Administration of Government and Private Antitrust Actions. The Court Should Clarify This Area of the Law.

In the decision at issue herein, the lower courts have interpreted Section 5(b) of the Clayton Act to mean that the statute of limitations on damage actions brought under the antitrust laws may be suspended repeatedly by successive, non-contemporaneous Government proceedings. This decision is contrary to the plain language of the statute that "*whenever* the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, *any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.*" 15 U.S.C. §16 (b) (Emphasis added). This decision is unique. No other court has ever held and, to our knowledge, no other plaintiff, private or governmental, has ever asserted that the statute of limitations for antitrust damage claims is tolled repeatedly and indefinitely each time an additional Government proceeding is brought with respect to the matter in question. This decision, if left undisturbed, would seriously impede the admin-

istration of both public and private actions under the antitrust laws.

When a violation of the antitrust laws is suspected, the Government often brings separate proceedings based upon the same alleged violations. Typically the Government will bring both a criminal action to punish the alleged violators and a separate civil action to enjoin any further violation. These Government suits may be pursued at the same time, or, since the statute of limitations is applicable only to public and private damage actions,* the Government actions may be brought months or years apart from each other. Indeed, the Government may bring a contempt proceeding to enforce a decree many years after the filing of the original suit in which the decree is entered. It is quite common for the Government, over a substantial period of time, to bring a number of antitrust actions (arising out of a single matter) in which the issues raised, facts developed and points of law argued are similar or even identical. The decision below, that the statute of limitations is tolled again and again as each of these proceedings is brought by the Government, will be of far-ranging importance in the administration of the antitrust laws.

In modern times, statutes of limitations have served the function of preventing old cases from clogging the calendars of our over-burdened courts. Because antitrust suits are often protracted affairs involving voluminous factual evidence, complex and detailed economic analysis, and lengthy appeals, it is essential to

*The statute of limitations for antitrust actions is Section 4B of the Clayton Act. By its express terms, it applies only to actions brought under Section 4 (private treble damage actions) or under Section 4A (suits by the Government to recover actual damages).

the successful administration of the antitrust laws that defendants be encouraged to settle these suits rather than go to trial. Furthermore, it is in the public interest that our courts not be flooded with suits that should have been settled. A prime factor weighed by a defendant considering settlement of antitrust litigation is his ability to predict with considerable certainty the subsequent effect of the settlement on his rights. Until recently, Section 5(b) assured defendants in Government antitrust actions that, if they settled their suits with the Government, one year thereafter they would be immune from private suits based on the same matter if the private suits were more than four years old. However, under the reading of Section 5(b) below, defendants cannot predict the effects of a settlement with the Government because any Government proceeding brought on the matter after termination of the first proceeding—including a contempt action many years hence—would "suspend" the statute anew. Hence, the incentive to settle with the Government which Congress sought to provide by limiting the suspension period to the duration of a single Government "proceeding" plus one year is destroyed. Defendants who cannot predict with reasonable certainty the termination of their liability once they have settled with the Government are likely not to settle at all.

A statute of limitations, while primarily designed for defendants' protection, will also confer a substantial benefit on plaintiffs who have brought timely suit. Where the limitations period has run and a defendant is secure from subsequent litigation, he may be willing to settle with a plaintiff whose timely suit is still pending. Indeed, this is precisely what happened in the present case. The petitioners herein made substantial

settlements in the belief they were dealing with all plaintiffs who had viable claims. It is highly unlikely that a settlement would have been made if the petitioners had known that they would be subject to a suit brought after the settlement. Such settlements are essential to the successful administration of the antitrust laws, and, by reason of the greater number of private suits, their settlement may well be of greater importance than settlement of Government suits. The Decision below will induce defendants to fight to the bitter end in both Government and private suits.

Another important policy adversely affected by the decision below is the policy favoring repose. It is a fundamental policy of law to prevent introduction of stale evidence, to forbid reliance upon faded memories, and to eliminate vain searches for vanished witnesses —a policy of fairness to defendants. This policy is of particular importance in the antitrust area because of the protracted and complex nature of antitrust proceedings. It is evident that, in establishing a four-year statute of limitations for antitrust actions, Congress intended to further the policy of fairness and to promote prompt adjudications as well as settlements. Section 5 (b)'s design to promote both settlement and fairness to defendants, as well as to promote timely private enforcement of the antitrust laws, is evidenced by the requirement that "whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever

barred unless commenced either within the period of suspension or within four years after the cause of action accrued."[7]

The present case presents a conflict between the basic limitations policy favoring repose and the exception to that policy designed to facilitate private enforcement of antitrust laws. The decision below resolved that conflict by allowing the exception to swallow the rule. It need not have done so. The decision below does not, in fact, promote private enforcement. It favors one private plaintiff in a particular set of circumstances and by so doing works a detriment to diligent private plaintiffs and defendants in most other circumstances. As indicated, it deters settlement and prompt resolution of disputes. Such impact is not justified by any important countervailing policies. The treble-damage plaintiff's interest in exploiting the fruits of a prior Government proceeding is adequately protected where he is required to assert his claim within a year after the termination of the first Government proceeding. Private plaintiffs bringing suit within one year after the termination of the first Government proceeding, will be able to glean the benefits from any subsequent Government proceeding since private suits normally last longer than the subsequent Government proceedings.

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[7] 15 U.S.C. § 16(b). See also, H. R. Rep. No. 422, April 1955, 84th Cong. 1st Sess. 2 (1955), which states as follows:

> "It further provides that while the period in which to bring a private treble damage action shall in no case be less than 4 years, nevertheless, in instances where a private suit is tolled because of the pendency of a Government proceeding private treble damage actions must be instituted within 1 year after the termination of the Government's case if, at the end of such period, 4 years or more shall have

(This footnote is continued on the next page).

B. The Decision Below That the Clayton Act's Statute of Limitations Is Tolled Until One Year After Termination of Government Proceedings Against All Defendants Is in Conflict With the Decisions of Other Circuits and Is of Great Importance in the Administration of the Antitrust Laws.

Not only did the courts below err in holding that the statute of limitations could be suspended repeatedly by successive, non-contemporaneous Government proceedings, they concluded also that, once the statute was suspended by a Government proceeding, it remained suspended as to each defendant until one year after the proceeding had terminated as to *all* defendants.[8] This decision, following the "last-defendant" rule, is in accord with decisions in the Third[9] and Eighth[10] Circuits but is in conflict with the decisions in the Second,[11] Seventh[12] and Ninth[13] Circuits. The latter,

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elapsed since the cause of action accrued. *This requirement is designed to prevent interminable delay and congestion of court calendars as well as encouraging the prompt adjudication of private damage suits.*" (Emphasis added).

[8]Such holding, in addition to being incorrect, fails to support the denial of petitioners' motion to dismiss. (See Appendix "F").

[9]*New Jersey v. Morton Salt Co.*, 387 F. 2d 94, 98-99 (3d Cir. 1967), *cert. denied*, 391 U.S. 967 (1967).

[10]*Michigan v. Morton Salt Co.*, 259 F. Supp. 35, 50 (D. Minn. 1966), *aff'd. sub nom. Hardy Salt Co. v. Illinois*, 377 F. 2d 768 (8th Cir. 1967), *cert. denied*, 389 U.S. 912 (1967).

[11]*Skouras Theatres Corp. v. Radio-Keith-Orpheum Corp.*, 193 F. Supp. 401, 403-05 (S.D. N.Y. 1961).

[12]*Grengs v. Twentieth Century-Fox Film Corp.*, 232 F. 2d 325, 333 (7th Cir. 1956), *cert. denied*, 352 U.S. 871 (1956); *Sun Theatre Corp. v. RKO Radio Pictures*, 213 F. 2d 284, 292 (7th Cir. 1954); *Century Hardware Corp. v. Powernail Co.*, 282 F. Supp. 223, 228-29 (E.D. Wis. 1968); and *Tague v. Balaban*, 146 F. Supp. 356, 361 (N.D. Ill. 1956).

[13]*Manny v. Warner Bros. Pictures*, 116 F. Supp. 807, 809-10 (S.D. Cal. 1953).

following the "defendant-by-defendant" rule, have interpreted Section 5(b) to toll the statute for one year after the termination of the Government proceeding as against each defendant, regardless of the continuation of the proceeding against other defendants who have declined to settle. This Court should grant *certiorari* to resolve this conflict.

Even if the Circuits were in agreement, this issue is so important to the administration of the antitrust laws that it merits a definitive resolution by this Court. Early settlement of antitrust actions, both governmental and private, is essential lest administration of the antitrust laws become bogged down in a multitude of unnecessary trials. The interpretation below, that Section 5(b) tolls the statute of limitations against a defendant for more than one year after it has settled with the Government, provides a further deterrent to settlement of antitrust cases. Under this interpretation, defendants, who otherwise might make a prompt settlement in a Government proceeding, will hesitate to do so unless and until all other defendants settle. In a complex action involving a number of defendants, settlement may be delayed indefinitely until that single moment occurs (if it ever occurs) when all defendants are simultaneously willing to settle. This would take from the Government one of its principal weapons in compelling settlement of its antitrust actions. The leverage of one settlement places pressure upon the remaining defendants to capitulate. Recalcitrant litigants should not have the power to prejudice litigants willing to cooperate in making a settlement. It is hard to believe that Congress intended such a bizarre result from Section 5(b), but in any event the question deserves a definitive answer by this Court.

C. The Decisions Below Misread the Plain Language of Section 5(b) and Prior Supreme Court Decisions Interpreting It, Thus Causing Substantial Confusion in This Important Area of the Law. This Court Should Grant Certiorari to Clarify the Meaning of the Statute.

The mere existence of an erroneous decision in a lower court is not, of course, grounds for the exercise of this Court's *certiorari* jurisdiction. However, when a lower court misreads the plain language of a statute and extends the rationale of this Court's decisions far beyond the basis of those opinions, the resultant confusion may warrant this Court granting *certiorari* to reassert precision of thought in this area of the law.

The courts below were dealing with a statutory exception to the general antitrust statute of limitations, which exception preserves private antitrust actions during the pendency of a Government antitrust proceeding dealing with the same matter. Despite the fact that the language of the statute refers explicitly to a Government *"proceeding,"* the courts apparently read the statute's word, *"proceeding"* (singular), to be *"Proceedings"* (plural). See footnote 17, *infra*. In so doing, the courts below interpreted an exception to the statute of limitations so broadly as to defeat the basic barring provisions of the Section 4B *and* Section 5(b). Those barring provisions are an integral part of the carefully constructed statutory scheme which Congress enacted.[14] The

[14]The language of the statute is unequivocal: ". . . *whenever* the running of the statute of limitations in respect of a cause of action arising under Section 15 of this title is suspended hereunder, any action to enforce such cause of action *shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.*" 15 U.S.C. § 16(b) (Emphasis added). Such language clearly requires that the action brought by plaintiff below be barred as not timely. The criminal cases upon which this action is based terminated

scheme clearly requires a plaintiff ". . . to *bring his action* either (a) within the suspension period, *i.e.*, within 1 year after the Government suit had terminated, or (b) within 4 years after his cause of action accrued."[15] This policy is totally abrogated by the decisions below.

Since so many Government antitrust actions are pursued in separate proceedings, the Court's reading of the statute is likely to cause substantial uncertainty as to the meaning of Section 5(b), which meaning, prior to the decisions under consideration herein, was assumed to be settled by the plain and unequivocal language thereof. If congressional policy in a critical area is not to be thwarted by judicial re-writing of statutes, this Court should declare in this case that when Congress expresses its intent in clear and precise terms, that intent must be effected by the courts.[16]

The District Court's opinion, affirmed *per curiam* by the Ninth Circuit, misinterpreted two carefully reasoned opinions by this Court. In trying to justify its holding that Congress said one thing but really meant another, the District Court relied on the recent opinions of this Court in *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311 (1965) and *Leh v. General Petroleum Corp.*, 382 U.S. 54

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on June 19, 1964. One year thereafter, on June 19, 1965, plaintiff's action was barred by Section 5(b). Nevertheless, the courts below specifically refused to apply the barring provisions of Section 5(b).

[15]S. Rep. No. 619, June 21, 1955 [To accompany H.R. 4954]. 2 U.S. Cong. & Admin. News 1955, pages 2332-33. (Emphasis added).

[16]A statute of limitations "should be construed liberally to effectuate its purposes; but that does not give us the power to rewrite the statute of limitations at will, and make what was intended to be a limitation no limitation at all." *Pillsbury v. United Engineering Co.*, 342 U.S. 197, 200 (1952). *Cf. Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962).

(1965). In those cases, this Court faced the problem of determining what *kind* of Government proceeding tolled the statute under Section 5(b). To implement Congress's intent, this Court determined that the word "proceeding" should be construed broadly to include an FTC proceeding (*Minn. Mining & Mfg.*) and that the language, "based in whole or in part on any matter complained of in such proceeding," should be given a broad reading so as not to require complete identity between the Government proceeding and subsequent private suits in order for the tolling to take place (*Leh*). Certainly, this Court was correct in stating that the language of Section 5(b) must be *construed* broadly to carry out congressional intent, but the courts below relied on those cases as a mandate to *re-write* the tolling provisions of Section 5(b) so as to permit repeated suspensions of the statute. This was done in spite of the fact that Congress had plainly indicated by its use of the singular form of "proceeding" that it intended to toll the statute but once. It is evident the lower courts misread the statute. The District Court "quoted" the statute as reading that the limitations period is tolled by "any government proceedings," while in fact Section 5(b) refers to tolling by "any government proceeding."[17] This Court should re-affirm the legislative purpose as expressed by the exact words used by Congress and clarify any misunderstandings regarding the meaning of the *3M* and *Leh* cases.

D. This Court Should Clarify the Issue as to Whether Congress Intended Section 5(b) to Apply to a Governmental Entity.

In *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., supra*, this Court pointed out that

[17]See Decision of the District Court, 303 F. Supp. at 85.

"in 5(b), Congress meant to assist *private litigants* in utilizing any benefits they might cull from government antitrust actions." (381 U.S. at 317) The foregoing holding is in accord with the statutory history of Section 5(b) which emphasizes the congressional intent to assist "private litigants." Resolution of the issue as to whether Section 5(b) applies to any governmental entity whatsoever has now become important and timely. This arises by reason of the broad holding in *United States v. Grinnell*, 305 F. Supp. 285 (S.D.N.Y. 1969). Although relating to a suit brought by the Federal Government, the following holding is equally applicable to other governmental entities:

> "[I]t appears that *it was never intended to give the government the advantages of the tolling period. This result is consistent with the policy underlying the tolling provisions. Originally §5 was enacted 'to help persons of small means who are injured in their property or business by combinations or corporations violating the antitrust laws.'* S. Rep. No. 698, 63d Cong., 2d Sess. 10 (1914). [Emphasis added.] Such individuals must rely on the government's extensive resources for investigating antitrust volations and prosecuting the violators. The government itself does not have this excuse for delay. It should be held to the strict four-year period enacted by Congress to cut off stale claims and guarantee business efficiency.
>
> "The decision in Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., which emphasized the importance of the benefits given litigants by § 5 (b), is not contrary to this conclusion. In that case the Court stated that 'it is plain that in § 5(b) Congress meant to assist *private litigants*

in utilizing any benefits they might cull from government antitrust actions.'" (305 F. Supp. at 287) (Court's emphasis); (Citations omitted).

E. Certiorari Should Be Granted so the Court May Resolve the Recurring Question of Whether Section 5(b) Tolls the Statute of Limitations Against Parties Who Are Not Named in the Government Proceeding Which Triggers the Tolling Provision.

The foregoing proposition is the subject of a separate petition for *certiorari* filed herein by petitioner Martin-Marietta Corporation and other petitioners similarly situated. Accordingly, the undersigned petitioners will not duplicate argument in connection therewith.

II.

The Decision Permitting the Tacking of Successive Disabilities to Extend Suspension of the Statute of Limitations Is in Conflict With Applicable Decisions of This Court.

At issue herein is the determination of which doctrines are impliedly incorporated into federal statutes of limitations. It is well settled that the doctrine of fraudulent concealment is so incorporated. Indeed, the federal courts have said that the force of such a traditional doctrine "is so strong that it is applicable unless Congress expressly provides to the contrary in clear and unambiguous language.[18] The doctrine of incorporation was established in the early United States Supreme Court case, *Bailey v. Glover*.[19] An even earlier United States Supreme Court case, *Mercer v. Selden*,[20] rec-

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[18] *Atlantic City Electric Co. v. General Electric Co.*, 312 F.2d 236, 241 (1st Cir. 1962).

[19] 88 U.S. (21 Wall.) 342, 347-48 (1875).

[20] 42 U.S. (1 How.) 35 (1853).

ognized the rule against tacking successive disabilities to toll the statute of limitations. That traditional rule of equity is so strong that it, too, is deemed incorporated in federal statutes of limitations unless Congress expressly provides to the contrary. Two recent federal court cases have explicitly acknowledged the applicability in an antitrust context of the prohibition against tacking successive disabilities. In *Dickinson, Inc. v. Kansas City Star Company*,[21] the court stated:

> "The rule is, that 'successive disabilities may not be tacked to one another so as to bring a party within the exceptions to the statute of limitations.' [Citations omitted.] It is the 'tacking' of one limitation to another that would create the intolerable condition that defendants argue in the instant case." (174 F. Supp. at 425.)

Similarly, in *Michigan v. Morton Salt Co.*,[22] the court distinguished the facts involved therein from the situation, such as in the proceedings below, in which the two Government actions were *not* pending concurrently. With respect to non-concurrent proceedings, the court agreed with the conclusion reached in *Dickinson* that truly successive disabilities could not be "tacked" together. The court reasoned:

> "It may be that in some instances, tolling the statute during successive actions would result in treble damage claims of such vintage that it would be patently unreasonable to assume that Congress meant to allow 'tacking' under § 5(b).

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[21] 173 F. Supp. 423 (W.D. Mo. 1959).

[22] 259 F. Supp. 35 (D.Minn. 1966); *aff'd. sub nom., Hardy Salt Co. v. Illinois*, 377 F.2d 768, *cert. denied*, 389 U.S. 912 (1967).

> ***But here*** the civil complaint was filed within two weeks of the indictment. Although not simultaneously commenced *'the two actions were pending concurrently.'* " (259 F. Supp. at 51) (Emphasis added).

A decision that a plaintiff may not tack successive, non-contemporaneous Government actions to extend the statute of limitations is the only decision consistent with the plain language of the statute, with the foregoing decisions and with the concept of fair play which should be accorded any litigant under our judicial system. Furthermore, the decisions below overturn the well-settled doctrine of this Court against the tacking of successive disabilities to extend suspension of the statute of limitations.

Conclusion.

This Court has never decided or given guidance on the proper application of the tolling provisions of Section 5(b). The present case presents a unique opportunity to do so inasmuch as it raises most of the issues inhering in Section 5(b), including issues which have been the subject of conflicting decisions by the courts for various circuits. Among those conflicting decisions is the erroneous decision of the courts below that the barring provisions of Section 5(b) may be totally abrogated by judicial fiat even though such provisions are an indispensable part of a carefully constructed statutory scheme for the enforcement of the antitrust laws. That decision, if left undisturbed, would leave the statute of limitations open ended and subject to indefinite extension at the whim of the Government by the simple expedient of filing successive, non-contemporaneous actions. Moreover, under the last-de-

fendant rule, the statute is further suspended as to all defendants if a single defendant fails to make its peace with the Government in any one of the Government civil and criminal antitrust cases upon which the treble-damage claim is purportedly based.

In the interests of justice and effective administration of the antitrust laws, this Court should grant *certiorari* in order to rectify the errors below and dispel confusion as to the application of Section 5(b).

Respectfully submitted,

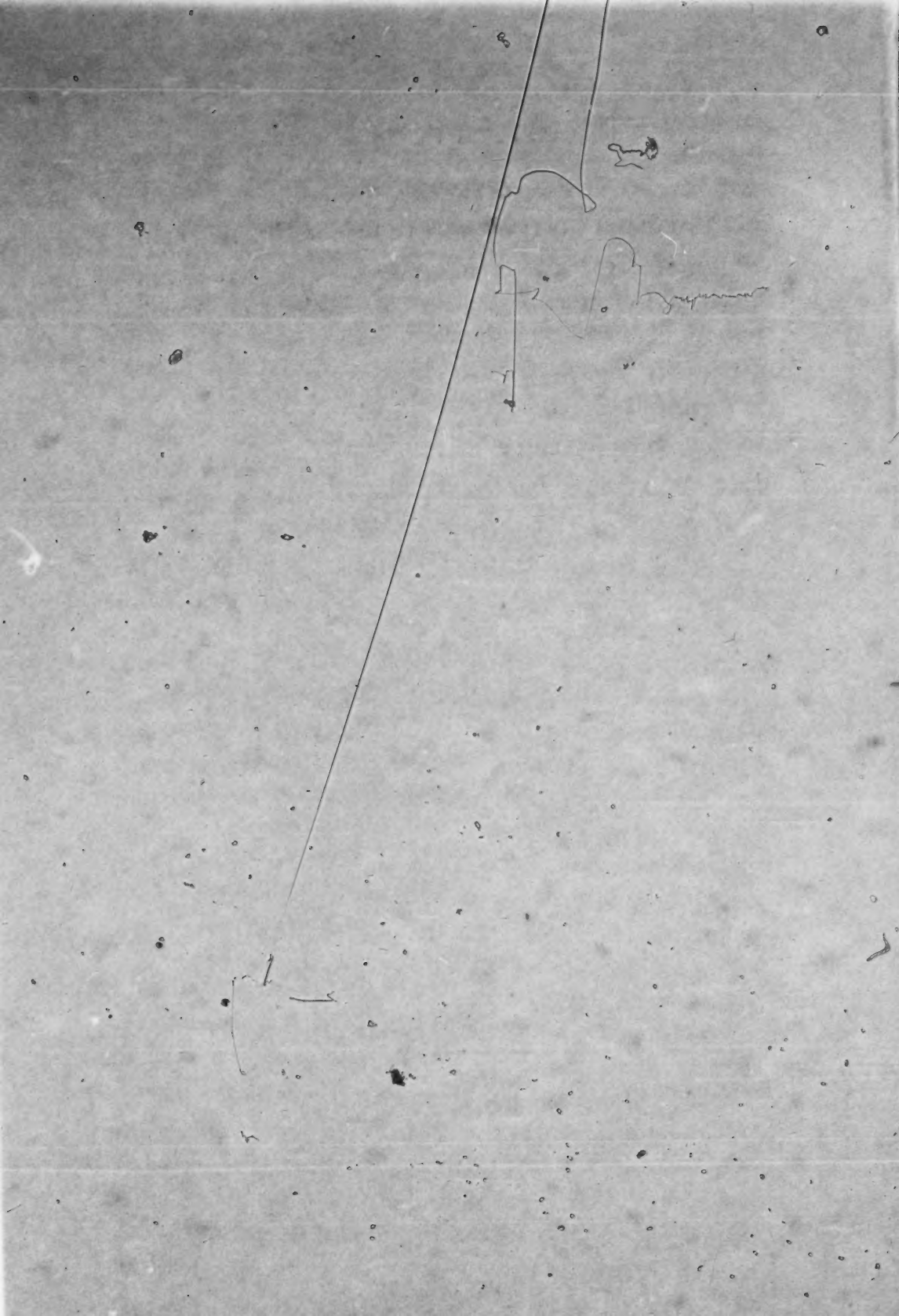
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November 18, 1970.



APPENDIX "A".

Judgment.

United States Court of Appeals for the Ninth Circuit.

Maricopa County, Plaintiff-Appellee v. American Pipe and Construction Co., et al., Defendants-Appellants. No. 24737.

APPEAL from the United States District Court for the District of Arizona.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered August 28, 1970,

APPENDIX "B".

Decision on Defendants' Motions to Dismiss and/or for Summary Judgment.

Maricopa County v. American Pipe and Construction Co., *et al.* 303 F. Supp. 77, 79-90 (1969).

Maricopa County, a body politic, Plaintiff, v. American Pipe and Construction Co., American Concrete Pipe Co., Kaiser Steel Corporation, Smith-Scott, Inc., United Concrete Pipe Corporation, United States Steel Corporation, Martin-Marietta Corporation, United States Industries, Inc., Arizona Concrete Pipe Co., Six Points Lumber & Supply Co., dba O'Malley Gannaway Concrete Pipe Co., all corporations, Defendants.

Civ. A No. 69—149 PHX.

United States District Court, D. Arizona.

Aug. 1, 1969.

PENCE, District Judge.

The defendants above named have each and all filed motions to dismiss and/or for summary judgment against the plaintiff, maintaining that its Sherman 1 and 2 antitrust action is barred by the statute of limitations and laches. Some defendants have raised additional grounds, fully discussed hereafter. The chronological sequence of events preceding the filing of plaintiff's action on April 19, 1969, and its amended complaint on May 22, 1969 is therefore important.

CHRONOLOGY OF EVENTS

On March 10, 1964, the United States Grand Jury at Los Angeles returned five indictments against defendants American Pipe and Construction Co. (American), United Concrete Pipe Corporation (United),

Kaiser Steel Corporation (Kaiser), United States Steel Corporation (U. S. Steel), United States Industries (USI), and Smith-Scott, Inc. (Smith-Scott), charging them (and certain of their officers) with combining and conspiring together in restraint of interstate trade in steel and concrete pipe, in violation of 15 U.S.C. § 1 (Sherman 1), in that they submitted collusive and rigged bids for the sale of such pipe, and allocated and divided business among themselves.[1] On June 19, 1964, pleas of *nolo contendere* were made by all defendants and judgments of guilt were entered.

On June 23, 1964—four days later—the government filed civil actions in the United States District Court at Los Angeles against the same defendant corporations. In C.A. 64832, American and United were named defendants; in C.A. 64833, Kaiser and U. S. Steel were named defendants; in C.A. 64834, United, American, Kaiser and U. S. Steel were named defendants; in C.A. 64835, USI, Smith-Scott, U. S. Steel, American and United were named defendants; in C.A. 64836, U. S. Steel, Smith-Scott and USI were named defendants.[2] In these five government civil actions the United States predicated the complaints upon 31 U.S.C. §§ 231-233 (False Claims Act) and 15 U.S.C. § 15a (Clayton 4A). The complaints were based on the facts uncovered by the government in preparing its criminal indictments. On October 28, 1964, the government amended each of its five complaints by adding a new count under 15

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[1]Company, American Concrete Pipe Co., of Phoenix, Arizona, Pipe Linings Inc., "and various other companies • • • not made defendants in this indictment, participated as co-conspirators in the offense charged." *E.G.*, Indictment, Cr. 33340 (S.D. Cal.).

[2]Each complaint concerned itself with differing sizes of pressure and non-pressure steel and/or concrete pipe, but the charges of violations were all essentially identical.

U.S.C. § 4 seeking to restrain continuing violations by the defendants of Section 1 of the Sherman Act.

Some two years later, on December 8, 1967, with the consent of each defendant except American, a "Partial Final Judgment" was entered in each case, *i.e.*, by December 8, 1967, all save American compromised and settled their cases with the United States. These "partial final judgments" enjoined each of the consenting defendants from engaging in enumerated violations of Sherman 1 for five years.

On May 24, 1968, a "Final Judgment" was entered against American—only—in each of the three government cases in which it had been named as a defendant. It is thus clear that although the judgments of December 8, 1967, were called "Partial Final Judgment," they were in fact final judgments as to all named defendants except American.

In 1961, a Clayton 7 divestiture action was brought by the Federal Trade Commission (FTC) against Martin-Marietta Corporation (Martin-Marietta), and on March 12, 1963, a consent decree was entered, ordering not only divestiture by Martin-Marietta of certain named concrete pipe and other plants within twenty-four months but also placing a ten-year restraint on Martin-Marietta against acquisition of similar plants.

On August 21, 1967, the cities of Phoenix, Mesa, Tucson, Tempe, Scottsdale and Flagstaff, and the towns of Goodyear and Showlow, all Arizona municipal corporations, filed a Sherman 1 and 2 violation complaint in the District of Arizona, similar to the one filed by the plaintiff herein, denominated a "class action", against American, American Concrete Pipe Co.

(American Concrete),[2a] Kaiser, Smith-Scott, United, USI and U. S. Steel. The State of Arizona, through its Attorney General, as a subsequent intervening party plaintiff in that action, thereafter on September 20, 1968 entered into a covenant not to sue with defendants U. S. Steel, Kaiser and USI. Due to settlement negotiations, this Arizona "class action" never moved beyond the basic initial proceedings, and no rulings were made by this court on the class action aspect of the case and no intervention was made by any possible member of the "class", except the State of Arizona. The plaintiff here, Maricopa County, never moved to intervene in that action.

On April 19, 1969, plaintiff herein filed its complaint against all of the defendants named in the heading of this case except Arizona Concrete Pipe Co. (Arizona Concrete) and Six Points Lumber & Supply Co. (O'Malley). On May 22, 1969, plaintiff filed its First Amended Complaint against the same defendants named in the original complaint and added Arizona Concrete[2b] and O'Malley. The complaints charged all defendants with the same acts, as violating Sherman 1 and 2, as were delineated in both the government's criminal and civil actions.

DEFENDANTS URGE NINE THEORIES

All defendants maintain (1) that since there was at least a four-day hiatus between the termination of the criminal actions by the government and the filing of government civil actions which did not toll the stat-

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[2a]For the purpose of this decision, American and American Concrete are considered one and the same, and the term "American" as used hereafter applies to both.

[2b]Arizona Concrete had entered no appearance in this case when defendants' motions were argued on June 16, 1969.

ute, therefore the tolling period, under § 5(b), within which the plaintiff was privileged to file its suit, terminated on June 18, 1965, *i.e.*, one year after the termination of the criminal actions; and (2) since the plaintiff alleged that defendants' illegal conspiracies terminated some time in 1962, ergo, the last date upon which plaintiff could have filed, to have any possible cause of action within the four-year statutory period of limitations under Clayton 4B (15 U.S.C. § 15b), would be not later than the end of 1966.[8]

All defendants further maintain (3) that there can be no tacking of successive tolling periods on to that invoked by the government's criminal actions, so that even though the government on October 28, 1964, amended its complaint to add an injunctive count which would normally invoke the tolling provisions of § 5(b), neither can the possible tolling aspects raised by the government's amended complaints be related back under the F.R.Civ. P. 15(c) to June 24, 1964, when the government's non-tolling complaints were initially filed, nor can the amended complaints have any tolling effect whatsoever. To do so, defendants argue, would be to tack on successive tolling periods. All defendants, save American, Martin-Marietta and O'Malley, also urge (4) that since final judgments were entered in the government civil action against them on December 8, 1967, the tolling provisions of § 5(b) in any event, ended on December 8, 1968, as to them. Martin-Marietta and O'Malley urge (5) that since they were never named as defendants or co-conspirators in any government action,

[8]Although in paragraph 23 of its First Amended Complaint plaintiff alleges that the defendants acted together to conceal the conspiracy and the acts performed in furtherance thereof, the complaint does *not* allege fraudulent concealment from the plaintiff as a basis upon which the statute might be tolled.

civil or criminal in the "pipe" cases, neither the criminal nor the civil government actions had any tolling effect upon any cause of action now alleged against them, and since the plaintiff alleges the conspiracy terminated some time in 1962, the last date upon which plaintiff could have brought the present action was not later than the end of 1966. Martin-Marietta also maintains (6) that (a) the FTC action had no tolling effect as to it, inasmuch as the Clayton 7 action before the FTC was not based in whole or in part on any matter complained of in plaintiff's complaint and § 5(b) did not apply; and (b) even if it did, any possible tolling terminated one year after the entry of the FTC order on March 12, 1963. O'Malley also urges (7) that not only was it never an alleged co-conspirator or defendant in any government action but that also it had never been named a defendant in any end-user complaint filed in Arizona or anywhere else, therefore the tolling provisions of § 5(b) had no application to it.

U. S. Steel, Kaiser and USI also maintain (8) that inasmuch as Maricopa County is a political subdivision of the State of Arizona, and the State, by its Attorney General, entered into a Covenant Not To Sue with them on September 20, 1968, the plaintiff, as such a political subdivision, is bound by that covenant and estopped to bring this present suit.

All parties maintain (9) that the doctrine of laches should be applied because of the late, late filing of the complaint.

APPLICABLE LAW

Of course, the primary problems before this court are (a) whether or not the tolling provision of § 5(b) remained in full force and effect past June 19, 1965, and if so, (b) whether it so continued as to all conspirators named in the government suit except American, after December 8, 1968.

[1] It is settled that if a claim is brought after the running of the statute of limitations and such defect is apparent on the face of the complaint, it is tantamount to a failure to state a cause of action and such "defense" may be raised by a motion to dismiss, but since, as here, there are usually several tolling theories involved, necessitating that the motions be accompanied by reference to matters outside the pleadings, the usual practice is to include a motion for summary judgment together with that for dismissal.[4] These defendants' motions, then, are properly before the court.

[2-4] Section 4B of the Clayton Act (15 U.S.C. § 15b) recites that suits under §§ 4 or 4A of that Act are "forever barred unless commenced within four years after the cause of action accrued." A cause of action under the Sherman Act accrues when the antitrust laws are violated, and there is a causally related injury to business or property flowing from such violation.[5] A conspiracy of the nature here alleged is a continuing one and is in affect renewed during each day of its continuance.[6] When the cause of action is based on such

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[4]Suckow Borax Mines Consol., Inc. v. Borax Consolidated, 185 F.2d 196 (9 Cir. 1950).

[5]Flintkote Co. v. Lysfjord, 246 F.2d 368 (9 Cir. 1957).

[6]United States v. Borden Co., 308 U.S. 188, 60 S.Ct. 182, 84 L.Ed. 181 (1939); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940).

an alleged unlawful conspiracy, the cause of action accrues and § 4B begins to run upon the occurrence of each overt act causing damage to the plaintiff.[7] Since the complaint here alleges that the conspiracy began "in and about 1954" and continued until some time in 1962 with the overt acts occurring prior to the end of 1962, and the complaint here was filed on April 15, 1969, on the face of the complaint therefore more than four years must have passed since any overt acts could have last occurred and plaintiff's claims are therefore barred by reason of the running of the four-year statute of limitations fixed by § 4B unless the statute in this case has been suspended or tolled.

[5] Section 5(b) of the Clayton Act (15 U.S.C. § 16 (b)),[8] suspends the running of the statute of limitations as to private claims during the pendency of any government civil or criminal antitrust action "based in whole or in part on any matter complained of in" a government proceeding "during the pendency thereof and for one year thereafter." With certainty, therefore, the government criminal indictments, *supra*, put into effect the § 5(b) suspension of the statute as to the defendants named in the indictments and kept alive

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[7] *Suckow, supra* n. 4.

[8] "Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: Provided, however, that whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

plaintiff's privilege to sue for any of their overt, illegal acts causing injury to it within the four years prior to the return of the criminal indictments on March 10, 1964. The government's criminal actions were terminoted on June 19, 1964, when judgments of conviction were entered therein and the one-year extension of the suspension thereupon started running.

[6] The government's False Claims and Clayton 4A actions, as filed June 23, 1964, are expressly excluded from the tolling provisions of § 5(b). With equal certainty therefore, until the government amended its complaints on October 28, 1964, to add a claim for injunctive relief under 15 U.S.C. § 4, the pendency of those first government civil actions had no effect upon the ticking away of the one-year suspension period following June 19, 1964.

DEFENDANTS' THEORIES 1, 2, 3

Defendants maintain that when the suspension provisions of § 5(b) were started up by the return of the indictments on March 10, 1964, no government civil or criminal action filed thereafter would have any effect upon the period of suspension established thereby, i.e., there could be no tacking of tolling periods simply because there might thereafter develop an overlap in government civil-criminal anti-trust proceedings. Defendants' position flows primarily from dicta in Dickinson, Inc. v. Kansas City Star Company, 173 F.Supp. 423 (W.D. Missouri 1959). *Dickinson* involved a private antitrust action filed after the government had "simultaneously commenced a criminal and a civil action against defendants for violation of Section 2 of the Sherman Act." (At 423.) The government criminal action terminated before the government's civil action

ended, and the court rejected the defendants' argument that the § 5(b) suspension ended one year after the criminal action terminated. In holding that the plaintiff could take advantage of the *prima facie* effect of the criminal judgment (the basic question before the court being an evidentiary one), the court gratuitously stated that the result would be otherwise if the two government actions had been successively filed rather than contemporaneously brought:

> "The rule is, that 'successive disabilities may not be tacked to one another so as to bring a party within the exceptions to the statute of limitations.' 54 C.J.S. Limitations of Actions, p. 254, § 219." 173 F.Supp. at 425.

Dickinson (at 424), relying on Sun Theatre Corp. v. RKO Radio Pictures, 213 F.2d 284, 290 (7 Cir. 1954), held that the evidentiary benefits of the first paragraph of Clayton § 5 (15 U.S.C. § 16), and the tolling provisions of the second paragraph are "complimentary", and must be construed together. Thus, the court's conclusatory dicta was not illogical—in 1959.

The *Dickinson* dicta was referred to in the excellent decision of Judge Larson in State of Michigan v. Morton Salt Company, 259 F.Supp. 35, 51 (D.Minn. 1966):

> "It may be that in some instances tolling the statute during successive actions would result in treble damage claims of such vintage that it would be patently unreasonable to assume that Congress meant to allow 'tacking' under § 5(b). * * *

But Judge Larson thereafter watered down this postulation by continuing:

> "But here, the civil complaint was filed within two weeks of the indictment. Although not simultaneously commenced, the two actions were pending concurrently. I think this situation falls within permissible limits so that the suspension could continue until the conclusion of the civil suit."

Short of perfectly "concurrent" filings, this court fails to perceive any difference, in their tolling or tacking effect, between successive government antitrust proceedings, one of which may have been filed one minute, one hour, one day, one week, or any period of time after another has been filed.[9]

The "complimentary" and togetherness construction given Clayton §§ 5(a) and 5(b), by *Sun Theatre* and *Dickinson* was discarded and overruled in Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 317, 319, 85 S.Ct. 1473, 14 L.Ed.2d 405 (1965) (hereinafter cited as 3M), in holding that § 5(b) was completely severable from § 5(a), the court adding: "[T]extual distinctions as well as the policy basis of § 5(b) indicate that it was to serve a more comprehensive function in the congressional scheme of things." (At 319, 85 S.Ct. at 1477.)

Both *3M* and Leh v. General Petroleum Corporation, 382 U.S. 54, 86 S.Ct. 203, 15 L.Ed.2d 134 (1965), state and restate the principle that the scope of § 5(b) is not to be restrictively interpreted.[10] Al-

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[9]There's no such condition as being *only a little bit* pregnant.

[10]3M, *supra*, 381 U.S. at 319, 322, 85 S. Ct. 1473; Leh, *supra*, 382 U.S. at 56, 59, 86 S. Ct. 203.

though the legal concept of tacking successive periods of suspensions followed in Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561 (10 Cir. 1961), was not an issue in *Leh*, *Nisley* was approvingly cited therein. *3M* and *Leh* inferentially, but with certainty, overruled the legal logic and with it the conclusions of *Sun Theatre* and *Dickinson*, that absent "simultaneous" filing of government criminal and civil antitrust actions the "first in first out" rule on tolling would foreclose any possible overlapping or tacking of tolling emanating from a second and later filed government action.

As this court sees it, *Nisley*, *3M* and *Leh* are dispositive of this problem (and most of the others now before the court). *Nisley* permitted "tacking" to enable two plaintiffs to bring an action in 1958 for overt acts occurring in 1938, violating the antitrust laws, by first giving full effect to the 1942 war-time tolling statutes, 56 Stat. 71, as amended 59 Stat. 306, 15 U.S.C. § 16, under which all statutes of limitations applicable to antitrust violations were suspended until June 30, 1946. Then, in June of 1946, the government filed an antitrust indictment against the defendants which was dismissed upon the filing by the government, in September 1948, of an antitrust criminal information against the same defendants which was not terminated until June 2, 1957. Plaintiffs filed their action within one year thereafter, relying upon § 5 of the Clayton Act. The Court of Appeals in *Nisley* analyzed in depth the rationale and scope intended by Congress to be given § 5(b) when it enacted the same (see 300 F.2d at 568-569), and while holding, on the authority of *Sun Theatre*, the two subsections to be complimentary and should therefore be construed together, de-

cided that they were not "necessarily co-extensive in their frame of reference."[11] 300 F.2d at 569.

The Court in *3M* approved the reasoning of *Nisley* and stated:

> "[T]he textual distinctions as well as the policy basis of § 5(b) indicate that it was to serve a more comprehensive function in the congressional scheme of things. The Government's initial action may aid the private litigant in a number of other ways. The pleadings, transcripts of testimony, exhibits and documents are available to him in most instances. * * * Moreover, difficult questions of law may be tested and definitively resolved before the private litigant enters the fray. The greater resources and expertise of the Commission and its staff render the private suitor a tremendous benefit aside from any value he may derive from a judgment or decree. Indeed so useful is this service that government proceedings are recognized as a major source of evidence for private parties." 381 U.S. at 319, 85 S.Ct. at 1478.

The Court in *Leh*, referring to *Nisley* and *3M*, reaffirmed the rationale of both, restating that it was Congress' " 'belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws.' 381 U.S., at 318, 85 S.Ct., at 1477",[12] and that the overriding purpose of the Clayton Act's tolling provision is to assist private litigants

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[11]On that rationale, the appellate court found that a government antitrust suit was pending (for the tolling purposes of § 5(b)) from the time in 1946 when the criminal indictment was filed until the termination of the suit on the information in 1957. Nisley, *supra*, 300 F.2d at 570.

[12]Leh, 382 U.S. at 59, 86 S.Ct. at 207.

in utilizing any benefits they might cull from any government antitrust actions.

[7] *3M* and *Leh* unequivocally indicate that the language of § 5(b) must be given its broadest application in favor of enabling private litigants to reap every benefit that they possibly can out of any governmental criminal or civil antitrust litigation during the pendency of each and within one year thereafter. Congress has seen fit to extend to private litigants the privilege of waiting until any government action has come to an end and then extend the suspension for an additional one year. This court cannot deny to the plaintiff the fullest use of that congressional privilege.

Defendants cite 54 C.J.S. Limitations of Actions § 219, p. 254, as supporting their contention that the suspension of the four-year statute of limitations terminated on June 19, 1965, and that the filing of the government civil actions *after* June 19, 1964, could not extend nor add to the one-year suspension created by the government's criminal actions. Even a superficial glance at § 219 indicates that the rule that "[s]uccessive disabilities may not be tacked to one another so as to bring a party within the exceptions to the statute of limitations" was intended to apply to several disabilities of the same person, e.g., disability of infancy tacked to disability of coverture or insanity, etc. The case of Givens v. Jones, 158 Okl. 124, 12 P.2d 892, one of the cases cited in support of the rule, involved the problem of minority with subsequent mental incompetency after adulthood. The Oklahoma court correctly stated that the "party claiming the benefit of a disability can only avail himself of the existing disability when the right of action first accrues, *unless the statute provides otherwise.*" (Emphasis

added.) 12 P.2d at 894. Not only is the matter now before the court not concerned with several disabilities of the same person, but also the congressional act, suspending the statute of limitations, specifically provides for the suspension during any period that *any* government action is pending and for one year thereafter.

[8] This court recognizes the general rule that "statutes of limitations are statutes of repose and are favored by the courts",[13] and that the underlying purpose "is to force a litigant to get moving, * * * to pursue every avenue of relief promptly, while the evidence is fresh and the witnesses are available",[14] and that it was with this in mind, as well as for other reasons, that Congress fixed the statute of limitations in antitrust cases at four years. Having so fixed the statute of limitations, Congress could have stopped right there—but it didn't. Congress, with deliberation and specificity, disturbed that "repose" and overrode that purpose by enacting § 5(b), to make manifest that in encouraging the enforcement of the antitrust laws by private litigation, tolling of the statute was more important than the repose established thereby.

[9] By § 5(b) Congress has said that so long as "*any* government proceedings" (emphasis added) were pending and for one year thereafter, antitrust claims were not stale and could be enforced. In balancing the equities of plaintiff and defendant in repose and tolling, Congress deliberately weighted the law in favor of the private plaintiff and not the antitrust defendant. While

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[13]Hamrick v. Indianapolis Humane Society, Inc., 273 F.2d 7, 9 (7 Cir. 1959), *cert. den.* 362 U.S. 919, 80 S.Ct. 671, 4 L.Ed. 2d 739 (1960).

[14]Dedmon v. Falls Products Incorporated, 299 F.2d 173 (5 Cir. 1962).

the logic of the policy generally underlying a statute of limitations is to assure fairness to the defendants, who must bear the burden of suit, Congress made antitrust actions an exception to the general rule and instead made antitrust defendants fair game for the private plaintiff to shoot at for one year after the end of *any* government antitrust proceedings.

This court is not here faced with or considering the classical legal concept of tacking successive disabilities. The use of the term "tacking" in the context of § 5(b) is statutorily inapplicable if the congressional policy so definitively stated in *3M* and *Leh* is to be given the broad use and effect desired by Congress. Here, this court can be and is only concerned with the implementation of that congressional policy of giving every opportunity to private plaintiffs to enforce the antitrust laws. It was upon this last broad concept that *3M* extended § 5(b) to include not only governmental criminal actions and civil actions stemming from the same facts upon which criminal charges were based, but also to FTC actions, if private antitrust litigation thereafter undertaken was based in whole or in part on any matter complained of in *any* such government antitrust proceedings.[15]

[10] Congress made no distinction between government civil or criminal antitrust proceedings nor cared when either was filed. Any such governmental proceeding stands on its own legislative foundation and carries its own severable tolling provisions with it. If the periods of the government actions happen to overlap, the end of one tolling period following the termination of a government action does not in any wise disturb or cur-

[15]Excepting, of course, 15 U.S.C. § 15a actions.

tail the free flowing river of suspension created by and welling from the filing of any government antitrust proceedings. Private antitrust litigation may be filed at any time prior to one year after the termination of *any* criminal or civil proceedings, whenever the same may have been filed, concurrently or successively. As indicated, if two or more periods of tolling happen to overlap, as is here the case, then since the statutory tolling period has never become moribund nor buried, the tolling privisions continue to be viable until the end of the one-year extension following the termination of the last government action to end.

One caveat, however, is illustrated by the present case. Presupposing that before that one year period of suspension following the termination of criminal actions had ended, i.e., June 19, 1965, the government had filed its same False Claims and § 4A actions (as was here done), and *after* June 19, 1965, the government had then amended its civil actions to add an antitrust injunctive count, this court would have no hesitancy in stating that the insertion of the injunctive antitrust count by amendment would not revive any claims already made moribund by the termination of the one-year extension. "What is dead, is dead", and an attempted heart transplant by the relation-back theory on amendments under F.R.Civ.P. 15(c) would not revive the cause of action.[16] That, however, is not the situation here.[17] The one-year suspension period follow-

[16]*Cf.* Nisley, 300 F.2d at 571, Salyers v. United States, 257 F. 255 (8 Cir. 1919); Standard Oil Co. v. Perkins, 396 F.2d 809 (9 Cir. 1967), rev'd on other grounds, 395 U.S. 642, 89 S.Ct. 1871, 23 L. Ed. 2d 599 (1969).

[17]If the government filed a new action under 15 U.S.C. § 4 after the one year had expired, the result, of course, would be the same.

ing June 19, 1964, had *not* ended, when on October 28, 1964, the government amended its complaint to file the injunctive count, so this court is not called upon to decide the effect of F.R.Civ.P. 15(c) on an already demised cause of action.

DEFENDANTS' THEORY 4

[11] Inasmuch as the government's antitrust injunctive count was filed within one year from the date of the end of the government's criminal actions, the period of suspension of the four-year limitation period never died but continued on to the advantage of any laggardly plaintiff for not only one year after December 6, 1967, when final judgments were filed as to all defendants named in the government's civil actions save American, but also continued its tolling effect until one year after final judgment in the case involving American.

There is no question but that by this holding, defendants U. S. Steel, Kaiser, United, Smith-Scott and USI are badly hurt because of the failure of American to settle out with the government at the same time in 1967 that they did. Unfortunately for them however, by their prior conspiratorial actions they had become solidly chained to American until all government cases were terminated and were, willy-nilly, dragged along into their present predicament by the stubborn refusal of American to conclude its case with the government when they did. Since plaintiff's action is based almost wholly upon the same conspiratorial acts alleged by the government in both its criminal and civil actions, the statute of limitations thus remained tolled as to all defendants named in the government actions until one year after the government's civil case against Amer-

ican had terminated, viz., until May 24, 1969. The plaintiff, having filed its action against those defendants on April 15, 1969, therefore gains the fullest advantage of the tolling provisions of § 5(b), in the optimum implementation of the congressional policy as interpreted in *3M* and *Leh*.

DEFENDANTS THEORIES 5 and 7

[12] Martin-Marietta and O'Malley, however, were not defendants in the government suit nor were they named as co-conspirators. A comparison of the allegations in plaintiff's complaint, here, with the government complaints, makes it manifest, however, that the alleged conspiratorial acts of these two defendants were entwined with and fundamentally the same as those of the defendants named in the government actions; with certainty, plaintiff's claims against them are "based in whole or in part" on the violations alleged in the government actions. 15 U.S.C. § 16(b). Prior to *Leh*, in the Ninth Circuit, this similarity probably would *not* have been sufficient to toll the statute as to them. Steiner v. 20th Century-Fox Film Corp., 232 F.2d 190 (9 Cir. 1956), demanded that under § 5(b) a " 'greater similarity is needed than that the same conspiracies are alleged. The same means must be used to achieve the same objectives of the same conspiracies by the same defendants.' 232 F.2d, at 196."[18] The Supreme Court, in *Leh*, overruled *Steiner*. The Court of Appeals, in *Leh*,[19] in following *Steiner*, had concluded that the running of the statute of limitations was not suspended because "there were not only different overt acts charged, but different conspiracies, occurring at differ-

[18] 382 U.S. at 57, 86 S.Ct. at 206.

[19] 330 F.2d 288 (9 Cir. 1964).

ent times, between different parties."[20] The Supreme Court, in *Leh*, however, held that the "private plaintiff is not required to allege that the same means were used to achieve the same objectives of the same conspiracies by the *same defendants* (emphasis added). Rather, effect must be given to the broad terms of the statute itself—'based *in whole or in part* on *any matter* complained of'" (italicized in original), and continued: "[T]he courts must not allow a legitimate concern that invocation of § 5(b) be made in good faith to lead them into a niggardly construction of the statutory language * * *."[21]

If more were needed, the Supreme Court, in *Leh*, referred back to *3M* and found that the difference in parties did not prevent a tolling of limitations as to *3M*, since the private plaintiff's Sherman Act claims set up substantially the same claims as were presented by the government in the Clayton Act proceedings before the FTC. The Court concluded:

> "Just as in *Minnesota Mining* the differences between Sherman Act and Clayton Act proceedings were held not to require the conclusion that the private action under the Sherman Act was not based in part on any matter complained of in the Government's § 7 suit, so here we cannot conclude that a private claimant may invoke § 5(b) only if the conspiracy of which he complains has the same breadth and scope in time and participants as the conspiracy described in the government action on which he relies. Here there is substantial identity of parties, six of the seven defendants in

[20] *Id.* at 301.

[21] 382 U.S. at 59, 86 S.Ct. at 207.

> this case being defendants in the government suit as well. In suits of this kind, the absence of complete identity of defendants may be explained on several grounds unrelated to the question of whether the private claimant's suit is based on matters of which the Government complained. In the interim between the filing of the two actions it may have become apparent that a party named as a defendant by the Government was in fact not a party to the antitrust violation alleged. Or the private plaintiff may prefer to limit his suit to the defendants named by the Government whose activities contributed most directly to the injury of which he complains. On the other hand, some of the conspirators whose activities injured the private claimant may have been too low in the conspiracy to be selected as named defendants or co-conspirators in the Government's necessarily broader net."[22]

So here, the two defendants, Martin-Marietta and O'Malley, though never mentioned in the government actions, nevertheless are also caught by the gills with the other alleged co-conspirators who became entangled in the government's net.[23]

DEFENDANTS' THEORY 8

[13] The covenant not to sue executed by the State of Arizona in favor of U. S. Steel, Kaiser and USI purported to bind the State of Arizona, its departments, agencies and entities, to refrain from suing the three corporations for any antitrust "pipe" claims it might have against them and any overt acts of the three de-

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[22] *Id.* at 63-64, 86 S.Ct. at 209.

[23] See also Morton Salt, *supra*, 259 F. Supp. at 53-55.

fendants prior to June 20, 1968. It is noted that the State actually intervened as a party plaintiff in the action brought by the cities of Phoenix, Mesa, Tempe, etc., and the towns of Goodyear and Show-low.[24] Thus the State certainly purported to be an entity separate from the cities and towns within it. Under Arizona Revised Statutes § 11-202 each county in Arizona is a body politic and corporate, and by A.R.S. § 11-532 a county's attorney is given the authority to sue on behalf of that county. A.R.S. § 41-192 gives the State Attorney General of Arizona the power to coordinate the legal services required of other departments of the State or other State agencies This last power apparently gives to the Attorney General the power to bring actions on behalf of the counties only when the county specifically requests the Attorney General to so represent it.

Plaintiff's Exhibit 2 shows that the State Attorney General at no time represented Maricopa County in the Phoenix, et al., case, nor was he ever requested to so represent Maricopa County. The State of Arizona did not intervene in the City of Phoenix case as a party in a class. The State of Arizona's covenant not to sue had no relationship to nor effect on the present action brought by Maricopa County.[25]

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[24]U. S. Steel Exhibit G, p. 406.

[25]Defendants U. S. Steel, Kaiser and Martin-Marietta have raised the issue that because this court set a cutoff date for intervention in some seven class actions filed in the states of Hawaii, Washington, Oregon and California, and such actions were subsequently settled, therefore the failure of plaintiff herein to have intervened therein before that cutoff date, in some manner forecloses it from bringing the present action. The several class actions involved in the 1965 cutoff order of this court, on the face of each complaint affected thereby, limited the parties of the class to the public agencies in each of the above several states. The plaintiff here was never officially notified of the pendency of those class actions, nor did it join in the same.

DEFENDANTS' THEORY 9

[14] All defendants maintain that in any event plaintiff's cause of action is barred by laches. It was laches which apparently concerned Judge Larson in *Morton Salt* when he said:

> "It may be that in some instances tolling the statute during successive actions would result in treble damage claims of such vintage that it would be patently unreasonable to assume that Congress meant to allow 'tacking' under § 5(b)." 259 F. Supp. at 51.

Assuming arguendo that laches might be a defense to an action at law,[26] nevertheless, Royal Air Properties, Inc. v. Smith, 312 F.2d 210, 214 (9 Cir. 1962), on laches in general, and *Nisley* as laches particularly applies to antitrust actions, hold that federally created statutes of limitation are not to be curtailed or cut short. The congressional intent that there must be preserved to the private litigant every possible benefit he can glean from any antitrust laws is the underlying and ever present factor in our decision-making process.[27]

[15, 16] Moreover, the equitable doctrine of laches is addressed to the discretion of the trial court to be determined by the particular circumstances of the case then before the court, the crucial consideration being whether there has been such a lapse of time as would do an injustice to the defendants if plaintiff's action were permitted to stand.[28] While the claims of the plain-

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[26]*Cf.* Schultz v. Manufacturers & Traders Trust Co., 40 F. Supp. 675 (W.D.N.Y. 1941).

[27]Cf. also United States v. Manufacturers Hanover Trust, 229 F.Supp. 544, 546 (S.D.N.Y. 1964).

[28]Refrigerated Transport Co. v. United States, 297 F.Supp. 5, 7 (N.D. Ga. 1969).

tiff involved purchases of pipe made by it prior to the end of 1962, it is not now urged by any of the defendants that they have no records of sales dating that far back. To the contrary, this court would take judicial notice of the fact that the records of sales transactions of the several defendants here have been produced, dating as far back as 1954, in the actions of the almost 400 plaintiffs filed in the various districts of the Ninth Circuit between 1964 and 1969, upon all of which cases this judge has sat. The circumstances of the alleged conspiracies, the documents and parties involved, have been developed in depth, and documents and depositions of the alleged conspiring parties are still readily available to each and every defendant. The lapse of time, in this case, in no wise affects the defendants' ability to respond to the plaintiff's complaint.

The defense of laches is here unavailable to the defendants.

DEFENDANTS' THEORY 6

This court's disposition of the statute of limitations problems as the same affect Martin-Marietta, makes it unnecessary for this court to pass upon plaintiff's allegations that the FTC proceedings, based on a violation of Clayton 7, filed January 27, 1961, followed by a consent order of that Commission on March 12, 1963, suspends the running of the statute of limitations against Martin-Marietta in this case, because the order of divestiture gave Martin-Marietta 24 months to dispose of certain plants and enjoined certain acts by Martin-Marietta for a period of 10 years.[29] As indicated

[29] *Cf. 3M* and *Leh, supra; Sun Theatre, supra,* 213 F.2d at 292.

by this court during oral argument, however, the FTC action is inapplicable. Not only were the alleged monopolistic acts of Martin-Marietta in the FTC's Clayton 7 complaint not even in part concerned with any of defendants' acts in violation of Sherman 1 and 2 as here alleged by plaintiff, but also the FTC order of divestiture and injunction, on March 12, 1963, terminated that proceeding for the purpose of § 5(b), even though a few implementary housekeeping chores were continued thereafter.

Defendants' motions to dismiss or for summary judgment are denied.

APPENDIX "C".

Opinion of the Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

Maricopa County, Plaintiff-Appellee, v. American Pipe and Construction Co., et al., Defendants-Appellants. No. 24,737.

[August 28, 1970].

Appeal from the United States District Court for the District of Arizona.

Before: HAMLEY and BROWNING, Circuit Judges, and THOMPSON,* District Judge.

PER CURIAM:

We affirm the order of the district court denying appellants' motion for summary judgment. We affirm on the grounds stated in the district court's opinion, except that we do not pass upon the soundness of the district court's dictum that a government antitrust proceeding filed more than one year subsequent to the termination of a prior government antitrust proceeding could not toll the running of the statute of limitations on private treble damage actions. Nor do we pass upon the contention, made for the first time in a reply brief in this court, that a partial summary judgment should have been granted because American Pipe and Construction Company was not named as a

*Honorable Bruce R. Thompson, United States District Judge for the District of Nevada, sitting by designation.

defendant in two of the five civil actions commenced by the government. We see no reason to depart from the general rule that a district court judgment should not be reversed on grounds not raised below. Our affirmance is without prejudice, however, to the filing in the district court by appellants of a motion for partial summary judgment raising this new issue.

HAMLEY, J., (Dissenting in part):

I concur in the majority opinion except insofar as it affirms the denial of the motion of Martin Marietta Corporation and Six Points Lumber & Supply Co., dba O'Malley-Gannaway Concrete Pipe Co.

The motion for dismissal of the action was made by these two defendants on the ground that plaintiff's claims against them are barred by the four year statute of limitations provided by section 4B of the Clayton Act, 15 U.S.C. § 15b. The district court rejected this ground for dismissal on the theory that, under the facts of this case, this statute of limitations was tolled by the provisions of section 5(b) of the Clayton Act, 15 U.S.C. § 16(b), in view of certain prior federal government civil and criminal proceedings.

Neither of the above-named defendants were ever named or complained of as defendants or co-conspirators in the prior civil and criminal actions brought by the federal government. In my view, the pendency of federal government civil and criminal actions cannot toll the running of the statute of limitations, as to persons or companies not named or complained of in such government actions.

The tolling statute, section 5(b) referred to above, limits tolling to private actions "based in whole or in part" on any matter complained of in the government

criminal or civil proceeding. Insofar as these two defendants are concerned, the instant case is not, in my opinion, based in whole or in part on any matter complained of in the prior government actions.

I recognize that the decision in *State of New Jersey v. Morton Salt Company*, 387 F.2d 94 (3d Cir. 1967) supports the view of the majority. It is no doubt true, as held in *Morton Salt*, that the tolling provision was enacted for the benefit of private parties who were injured. But I am not persuaded that Congress intended that provision to override, as to persons and companies in no way involved in the prior government antitrust suits, the salutary policy behind section 4B, as a statute of repose.

APPENDIX "D".

Order.

United States Court of Appeals for the Ninth Circuit.

Maricopa County, Plaintiff-Appellee v. American Pipe and Construction Co., et al., Defendants-Appellants. No. 24,737.

Filed Oct. 26, 1970.

Before: HAMLEY and BROWNING, Circuit Judges, and THOMPSON,* District Judge.

The panel as constituted in the above case has voted to deny the petitions for rehearing and to reject the suggestions for rehearing in banc.

The full court has been advised of the suggestions for in banc rehearing, and no judge of the court has requested a vote on the suggestions for rehearing in banc. Fed. R. App. P. 35(b).

The petitions for rehearing are denied and the suggestions for rehearing in banc are rejected.

Dated: October 23, 1970.

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*Honorable Bruce R. Thompson, United States District Court for the District of Nevada, sitting by designation.

APPENDIX "E".

1. United States Code, Title 15, Section 15 (Clayton Act of October 15, 1914, c. 323, § 4, 38 Stat. 731):

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

2. United States Code, Title 15, Section 15(a) (Clayton Act of October 15, 1914, c. 323, § 4A, as added July 7, 1955, c. 283, § 1, 69 Stat. 282):

> "Whenever the United States is hereafter injured in its business or property by reason of anything forbidden in the antitrust laws it may sue therefor in the United States district court for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover actual damages by it sustained and the cost of suit."

3. United States Code, Title 15, Section 15(b) (Clayton Act of October 15, 1914, c. 323, § 4B, as added July 7, 1955, c. 283, § 1, 69 Stat. 583):

> "Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said sections."

4. United States Code, Title 15, Section 16(b) (Clayton Act of October 15, 1914, c. 323, § 5(b), 38 Stat. 731, as amended July 7, 1955, c. 283, § 2(b), 69 Stat. 283):

> "Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however*, That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

APPENDIX "F".

American was not a party to Government action number 64-833 (Vol. Two, R.245; on which plaintiff's Fifth Cause of Action [Amended Complaint, para. XIII; Vol. One, R. 104] is based) or number 64-836 (Vol. Two, R. 306; on which plaintiff's Second Cause of Action [Amended Complaint, para. X; Vol. One, R. 100] is based). Therefore, even under the last-defendant rule relied upon below, the tolling period in such actions ended one year after the December 8, 1967, capitulation of the named defendants, or approximately five months prior to the filing of plaintiff's complaint. Furthermore, American Pipe and Construction Co. and United Concrete Pipe Corporation were the only parties to Government action number 64-832 (Vol. Two, R.224; on which plaintiff's Sixth Cause of Action [Amended Complaint, para. XIV; Vol. One, R.105] is based). Action 64-832 cannot affect the rights of other defendants herein unless the pendency of a Government action against one group of defendants tolls the statute of limitations as to other parties in other actions. Therefore, it is only as to actions involving alternate pressure pipe, *i.e.*, Government action number 64-834 (Vol. Two, R.264; on which plaintiff's Fourth Cause of Action [Amended Complaint, para. XII; Vol. One, R.103] is based) and number 64-835 (Vol. Two, R.285; on which plaintiff's Third Cause of Action [Amended Complaint, para. XI; Vol. One, R. 102] is based) that the tolling period did not terminate as to defendants Kaiser Steel Corporation and United

States Steel Corporation on December 8, 1968—approximately five months prior to the filing of the Complaint herein. Thus, even under the erroneous holding of the courts below, all of plaintiff's claims, except those in the Third and Fourth Causes of Action, are barred by the statute of limitations.

